In view of the division of opinion and the diversity of theories, it might be very desirable to reconsider the doctrine of Moore v. Copp. The rule of stare decisis—if we can consider that as settled upon which the court seems evenly divided—should have small weight in a matter of practice, and the principle that fraud need not be pleaded in the complaint, though the ultimate relief that the plaintiff may get is, in effect, the cancellation of a written instrument upon the ground of fraud, leads to inharmonies and inconveniences that should be avoided. Some of the results of the doctrine approved in the Pavlicevich case may be noted. First, the doctrine that the fraud is matter for the replication is not harmonious with the doctrine, elsewhere enunciated, that the legal title prevails in the action to "quiet title." The defendant in the Pavlicevich case plainly had the legal title.[11] Second, the plaintiff is enabled to demand a trial by jury, if he chooses, in a case where the issues are really equitable.[12] He may sue in ejectment upon a constructive eviction, and withhold his attack on the defendant's muniments of title until the replication. Third, the plaintiff is enabled to prove his case on rebuttal, with the advantage of cross examining the defendant as a hostile witness, and of impeaching him as such. Fourth, under the implied replication, it is possible that the defendant is not apprised of the claim of fraud until the trial, when he may have lost his evidence upon the subject,—evidence that might have been preserved had he known the real nature of plaintiff's case. The possible surprise is also a matter that should be considered, though doubtless the trial court could obviate this difficulty by proper continuances.

O. K. M.

Practice—Motion for Change of Place of Trial—Necessity of Notice of Motion.—It would scarcely seem to require judicial discussion to determine the meaning of statutes providing that notices of motions must be given in writing, stating the time when and the place where they are to be made and providing that, under certain circumstances, the place of trial may be changed on motion. Yet the Supreme Court [1] has been obliged to overrule a decision of the District Court of Appeal in which two judges held that the absence of a written notice of motion for change of place of trial was immaterial, and the other one, that the opposite party had waived his right to object because he appeared for the very purpose of urging that proper notice was not given,

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[11] County of Los Angeles v. Hannon (1910), 159 Cal. 37, 48, 112 Pac. 878, and cases cited.

[12] Angus v. Craven (1901), 132 Cal. 691, 64 Pac. 1091; McNeil v. Morgan (1910), 157 Cal. 373, 108 Pac. 69; Donahue v. Meister (1891), 88 Cal. 121, 25 Pac. 1096; Hughes v. Dunlap (1891), 91 Cal. 385, 27 Pac. 642.

[1] Bohn v. Bohn (Jan. 18, 1913), 45 Cal. Dec. 107.

and for no other purpose.[2] Mr. Justice Sloss says very pithily: "It is difficult to see how a party can be held to have waived a valid objection when he has done no more than to insist upon it in the only manner that is open to him."[3] It seems, however, to be well settled, that one objecting to the sufficiency of a notice, who, notwithstanding, contests the motion upon the merits must be considered as having waived its informality.[4] If he wishes to save his technical objection, he must, in effect, make a special appearance.

The decision of the Supreme Court, while it effectually disposes of the case before it, leaves open some interesting questions with respect to the practice on motions for change of place of trial. Suppose the party desiring the change gives no notice of motion at the time he appears, what would be the result? There seems to be no requirement in the statute that the notice of motion must be given at the time the defendant files his answer or demurrer, his demand for a change of place of trial and his affidavit of merits. Neither the statutes nor the decisions require the motion to be made within any particular time, nor do they settle the time when the notice should be given. Or, suppose that he gives a defective notice and the motion is denied upon that ground. The court suggests, with becoming judicial reticence, that a denial of the motion upon the ground of insufficient notice, "It may be, . . . would not be a bar to a subsequent motion upon proper notice."[5] Probably in answer to the first question, it would be held that the applicant for the change must make the motion within a reasonable time, at the risk of having his application denied upon the plaintiff's motion for that purpose because of his lack of diligence on pursuing it. And upon the doubt suggested by the court, it may be suggested that the most reasonable view to take of the renewal of motions denied for technical reasons would be to leave to the discretion of the trial court the determination of the question whether or not the motion should be renewed. Though the strict doctrine of res judicata has no application to notices in a pending action,[6] it will not do to hold that because there has been no adjudication upon the merits, the unsuccessful party may, as a matter of right, renew his motion as often as he pleases.[7] Such a rule would lead to intolerable abuses, especially in the case of such a motion as the one for a change of

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[2] Bohn v. Bohn (1911), 16 Cal. App. 179.

[3] 45 Cal. Dec. p. 111.

[4] Acock v. Halsey (1891), 90 Cal. 215, 27 Pac. 193.

[5] 45 Cal. Dec. p. 111.

[6] Ford v. Doyle (1872), 44 Cal. 635; Powers v. Cherokee Bob (1873), 46 Cal. 279; Gay v. (1905), 146 Cal. 237, 79 Pac. 885.

[7] There is authority to the effect that a motion denied for mere irregularity in the moving papers may be removed without bar. Corwith v. Illinois State Bank (1862), 15 Wis. 289. But the contrary view would seem to be the better upon principle, Irvine v. Myers (1861), 6 Minn. 558, 6 Gilf. 394, and is, in effect embodied in Section 182 of the Code of Civil Procedure, Johnston v. Brown (1897), 115 Cal. 694, 45 Pac. 686.

place of trial, the pendency of which undetermined ousts the court of jurisdiction to make any order save one granting or denying the motion.[8]

O. K. M.

Schools—County High Schools and Union High Schools.—In a recent case [1] the Supreme Court has been called upon to decide whether, when there is in the same county a "county high school" and a "union high school," the property owners within the union high school district shall be taxed to support the county high school. Subd. 20 of Sec. 1670, as enacted in 1893 (Sec. 9 of the original union high school act of 1891),[2] exempted such property in explicit terms. Subd. 4 of Sec. 1671, as enacted in 1893, provided that the board of supervisors, in raising money for the support of a county high school, should "levy a tax upon all of the assessable property of the county, except as provided in Subd. 20 of Sec. 1670." Section 1757, as enacted in 1909, seeks to accomplish the same exemption by providing: "The board of supervisors . . . must . . . levy a special tax on all the taxable property in such high school district and within their county, or in case of a county high school, upon all the taxable property in their county not in any high school district."

There has been one consistent policy exhibited in this matter by the high school legislation. And it can hardly be questioned that the legislature has acted within its constitutional rights in exempting property within a union high school district from taxation for the support of county high schools, as the Supreme Court in the case at bar has decided. This position finds support in the following considerations:

The establishment and change of boundaries of school districts is a legislative act; [3] school districts are corporate entities distinct from municipal or political subdivisions of the State, even though their territorial limits be coterminous; [4] the legislature has larger freedom in respect to the constitution and maintenance of high schools than of elementary schools; [5] high schools are governed by different laws of taxation than obtain in school districts generally; [6] and the validity of a tax cannot upon principle be upheld which falls upon property outside of the district to be benefited by its expenditure.[7]

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[8] Hennessy v. Nicol (1894), 105 Cal. 138, 38 Pac. 649; Brady v. Times Mirror Co. (1895), 106 Cal. 56, 39 Pac. 209.

[1] Wood v. County of Calaveras (1912), 45 Cal. Dec. 8.

[2] Stats. 1891, p. 182.

[3] Hughes v. Ewing (1892), 93 Cal. 414, 28 Pac. 1067.

[4] Los Angeles City School District v. Longden (1905), 148 Cal. 380, 83 Pac. 246; Hancock v. Board of Education (1903), 140 Cal. 554, 74 Pac. 44.

[5] People v. Lodi High School Dist. (1899), 124 Cal. 694, 57 Pac. 660.

[6] Brown v. Visalia (1903), 141 Cal. 372, 74 Pac. 1042.

[7] Hughes v. Ewing (1892), 93 Cal. 414, 28 Pac. 1067.